

COPY

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

IN THE MATTER OF:)	
PATRICK SHEETS,)	DOCKET NO. 05-02-319
Appellant,)	DECISION AND ORDER
v.)	
DEPARTMENT OF CORRECTION,)	
Agency.)	

BEFORE John F. Schmutz, Esquire, Chair, Paul R. Houck, Joseph D. Dillon, and Martha Austin, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. § 5908(a).

APPEARANCES:

For the Appellant:

Saagar B. Shah, Esquire
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For the Agency:

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NATURE OF THE PROCEEDINGS

This grievance appeal was filed with the Merit Employee Relations Board ("Board") on February 4, 2005 after an adverse Step Three grievance decision. *See* Merit Rule No. 18.0. The grievance matter appealed was the Agency's decision to not promote Mr. Sheets to Correctional Staff Lieutenant in 2004. Mr. Sheets seeks promotion to Staff Lieutenant and to be made whole.

Legal Hearings were held on November 16, 2006, and February 15, 2007, on the Agency's Motion to Dismiss, in which it argued this grievance matter was covered by a collective bargaining agreement and the appeal was untimely. Based upon the evidence presented at the Legal Hearing, the Agency withdrew its Motion to Dismiss and the Board accepted the Agency's withdrawal.

The Hearing was conducted on September 26, 2007. All witnesses were sequestered and the Appellant proceeded as the Moving Party under Merit Rule of Practice No. 14(C).

This is the Decision and Order of the Board which, for the reasons stated below, concludes that the Appellant failed to establish, by a preponderance of the evidence to the satisfaction of the Board, that the Agency's decision to not promote the Appellant was a gross abuse of discretion in the promotion pursuant to Merit Rule No. 18.5(3).

RELEVANT MERIT RULES

MERIT RULE NO. 10.4

Promotion. Candidates selected for promotion shall meet the position's minimum qualifications. Vacancies shall be filled by promotion wherever practical and in the best interest of the classified service. Consideration shall be given to qualifications, performance record, seniority, conduct and, where applicable, the results of competitive examinations.

MERIT RULE NO. 18.5

Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the minimum qualifications; (2) there has been a violation of Merit Rule 2.1 or any of the procedural requirements in the Merit Rules; or (3) there has been a gross abuse of discretion in the promotion.

SUMMARY OF THE EVIDENCE

Laurie McBride in sworn testimony stated she works at Howard R. Young Correctional Institute ("Young") and is also a Shop Steward for Local 247. She described the general process utilized for promotion. Seniority, test scores, interviews, attendance, discipline and commendations are considered for promotion, but in her experience seniority and test scores were given greater weight. She is familiar with the postings for Correctional Staff Lieutenant in 2004, identified at Agency Exhibit 1-B. A certification list was pulled for these postings in 2004. She did not attend these interviews. One position was posted at the time of the 2004 interviews, but two Staff Lieutenant positions were filled. The Union was not notified of the second vacancy. Usually, there is a second posting if another position exists.

In reviewing the certification list (Agency Exhibit 1-C), the posting contained one position number; there would have been two numbers if a second position was open. Wayne Lee was awarded the second Staff Lieutenant position, which she believed was not officially vacated until October 28, 2004. The final three candidates for the two positions were Joseph Sabato, Lee

and Lakisha Smith. The warden makes the final decision on promotion following review of the interviewing panel's recommendations. In reviewing two letters dated June 4, 2003 (Appellant Exhibit 1) and July 18, 2003 (Appellant Exhibit 2), Ms. McBride testified the letters concerned Lieutenant Sheets' discipline in 2003 for leaving his post when informed he had to stay an extra shift. Deputy Warden Phelps was involved with the imposition of this discipline and also participated on the interview panel for the 2004 Staff Lieutenant posting.

At Mr. Sheets' Step 1 grievance hearing, Warden Williams informed Mr. Sheets had not been selected for Staff Lieutenant in part because of discipline in his file. Ms. McBride provided the Warden with Mr. Sheets' request for removal of discipline, dated February 8, 2004 (Appellant Exhibit 3), which the warden had approved on February 12, 2004. She thought the discipline should not be an issue in Mr. Sheets' request for promotion.

On cross-examination, Ms. McBride acknowledged the warden did not mention discipline in his written grievance decision. The warden selected the top two candidates recommended by the interview panel for the two positions, acknowledging Mr. Sheets was not placed in the top three candidates. She was aware of Mr. Sheets' additional discipline in 2001 for use of excessive force. She acknowledged that according to Agency Exhibit 1-J, the personnel files of the final three candidates contained no discipline. She also acknowledged it was usual for Phelps to hold fact-finding hearings in disciplinary matters. She believed a point system was used for all Staff Lieutenant and Lieutenant positions at Young as of August 2004. In reviewing Agency Exhibit 1-B, Ms. McBride testified that a posting to supplement the register meant obtaining an updated certification list which could be pulled if and when an institution had an open position for Staff Lieutenant; the posting to supplement did not necessarily mean a position was open at a particular facility. The attendance of a shop steward during interviews is not in the collective bargaining agreement, but she believed it was an oral understanding between labor and management.

On re-direct examination, Ms. McBride testified that a first certification list must be closed before a second list can be obtained.

On re-cross examination, Ms. McBride testified four people were interviewed from the first certification list; she did not know if the practice has been to interview at least five people from a certification list.

On questions from the Board, Ms. McBride acknowledged that the posting at Agency Exhibit 1-B indicated that this posting was to supplement the register and also indicated that it was for current and/or future vacancies. She believed that individuals not hired from the first certification list should come back on the second cert list and return for re-interviews for additional positions.

Patrick Sheets in sworn testimony stated he is a Lieutenant at Young. A Staff Lieutenant is the executive officer one step under the Shift Commander, and responsible for all activities on the shift and to work as Shift Commander in his absence. He interviewed for the Staff Lieutenant position in July 2004, and was told by Phelps before the interview that there was one position. He learned in mid-September that Sabato and Lee had been promoted to Staff Lieutenant. He reviewed his record concerning seniority, attendance occurrences, discipline, commendations, and evaluations, and acknowledged his list of commendations and awards set forth in Appellant Exhibit 4. He believed Staff Lieutenant McClain had occupied the position awarded to Lee. He is grieving the appointment of Lee.

Mr. Sheets spoke with Warden Williams following his Step 1 grievance hearing. His 2003 discipline was officially removed in February 2004. A removal means the matter cannot be considered in subsequent discipline or promotion. He was an immediate supervisor of Annetta Phelps, who is the sister of Deputy Warden Phelps, and had issued supervisory counseling to her, with which she disagreed. Documentation of his counseling would have gone through the chain of command, which included Deputy Warden Phelps. He believed it was a general practice to have a Union representative present during interviews. Staff Lieutenant McClain had been on leave from work for approximately 8 or 9 months, and others, including Sabato and Lee worked in filling that position during her absence.

On cross-examination, Mr. Sheets had interviewed approximately three times for other Staff Lieutenant positions before the 2004 interview. He acknowledged there is a difference between a warden commendation and a letter of appreciation, and that only bureau awards or

warden commendations were listed for consideration (Agency Exhibit 1-J). He believed awards, letters of appreciation and the like would be taken into consideration when the Agency reviewed their personnel files. His primary grievance is with the process, and acknowledged his written grievance did not state that he was grieving Lee's promotion.¹ Mr. Sheets would not have filed a grievance if he had been interviewed for the second position. He acknowledged that Sabato's record was better than his in overall seniority, attendance, and evaluation, but contended that he rated similarly and competitively. Mr. Sheets has been informed he has some difficulty with interviewing. His supervisory counseling to Annetta Phelps was not anything different than what he would have done with any other correctional officer.

On questions from the Board, Mr. Sheets testified that Lee's score was not high enough to be on the first certification list, and believed he did not receive the opportunity to compete with Lee for the second posting.

Perry Phelps in his sworn testimony stated he was Deputy Warden at Young in July, August and September 2004. A certification list was requested from Human Resources ("HR") for an open staff lieutenant position in the summer of 2004. The warden appointed him to select an interview panel. He chose Vacation Holiday Relief Captain Philip Parker and Deputy Warden Larry McGuigan because they either had a flexible schedule or worked outside Young. He believed this was a diverse panel which interviewed all applicants for the Staff Lieutenant position. He created the question sheet for the interview (Agency Exhibit 1-E). Only four candidates, out of 21 candidates who were called, showed for the interviews on July 29, 2004. In general, they want at least five candidates to interview; therefore, a second certification list was requested and a second round of interviews occurred on August 26. He did not recommend who should be promoted between the July 29th interviews and the date requesting the second certification list. Following four interviews on August 26, they had a total of eight candidates who had interviewed for the Staff Lieutenant position. He understood there was only one opening when they conducted these interviews. He became aware of a second opening for Staff Lieutenant less than a month from the time of the second interviews. Given the responsibilities of

¹ Mr. Shah stipulated to the fact that the argued grievance against Lee's promotion was not in any of the documents submitted in the record, including the written grievance. The Appellant offered the answer concerning Lee's promotion at the hearing in response to a question Mr. Shah specifically asked.

a Staff Lieutenant, he would look for a good decision-maker who is knowledgeable in the rules, policies and practices of the facility. The same questions were asked of all candidates interviewed. He was not concerned the questions from the first interview became public knowledge because he had control over them.

Mr. Phelps testified the interviews were rated pass/fail. Candidates who gave the strongest and most detailed responses passed. Each member of the interview panel reached the same conclusion in selecting the top three candidates, who were chosen at the end of the entire session of interviews. The Appellant did not rank high enough to be chosen for the top three. The Appellant did not provide enough detail or knowledge in the interview that a lieutenant should know. In reviewing Agency Exhibit 1-F, Phelps testified about his documentation of the Appellant's interview responses and the absence of detailed information. Comparing the responses of Sebato, Lee and Sheets, Sebato and Lee provided more detailed answers. After reaching the top three candidates, he reviewed the top three candidates' personnel records, considering performance, attendance, commendations, discipline and any other factors in the selection process. He considers commendations and discipline for the past 2 years. He did not review personnel files of all candidates before the interviews because there were 21 candidates, some of whom may not show for or pass the interview. The Appellant did not pass the interview. The results of the interviews were placed in memos to the Warden (Agency Exhibit 1-K). The second memo provided the recommendation of Lee for a second vacancy. They did not re-interview for the second vacancy because they had completed interviews in July and August, and a recommendation of three candidates existed. After checking with HR, they believed they could look to the candidates interviewed as long as it was not over 30 days.

On cross-examination and in reviewing Agency Exhibit 1-C, Phelps believed the warden's secretary wrote additional notes as to selection, but did not know when she wrote them. She could not have written the notes in the beginning because he did not tell anyone that the panel had selected anyone. He did not recall if he informed Mr. Sheets that he was interviewing for one vacancy. It was possible Mr. Sheets may have given more detailed answers to the interview questions and Phelps missed writing them in his notes. It is possible to obtain a dual

incumbency for filling a position prior to the person occupying the position retiring or vacating, but he could not speak to the specifics about the filling of McClain's position.

Philip Parker in sworn testimony stated he was a Captain at Young in Summer 2004, and recalled the interviews for staff lieutenant in July and August 2004. He did not prepare the interview questions, and was not involved with post-interview activities. The interview panel selected the top three candidates based upon who best responded to the questions. He ranked Sebato, Lee and Smith as first, second and third, respectively, and believed this was the same consensus reached by the other panel members.

On cross-examination, Parker testified there were no points, but the panel based their decision on who gave the most detailed response. Generally, he would grade candidates after interviewing all candidates.

John Smart in sworn testimony stated he is a Human Resources Specialist for the Agency. He reviewed the personnel files of Sebato, Lee and Sheets. Lee was placed into a Staff Lieutenant position on October 3, 2004, and believed this was the position that was occupied by McClain.

On cross-examination, Mr. Smart did not provide direction to Phelps concerning the interviews in 2004 and, other than signing-off on the certification lists, he did not participate in the process for the filling of these two vacancies. A dual incumbency could fill a position before being formally vacated, but he did not know if this was done with McClain's position. He recalled seeing an internal commendation from Deputy Warden Hawthorn in the Appellant's personnel file, but did not see any bureau commendations. An employee is responsible for taking steps necessary to ensure commendations are in his personnel file. In reviewing Appellant Exhibit 6, he acknowledged these were two bureau commendations which he did not see in Mr. Sheets' personnel file.

FINDINGS OF FACT

The Board finds that the evidence presented by the Appellant did not support a determination that the Agency's actions here amounted to a gross abuse of discretion in the promotion. While he was interviewed on July 29, 2004 for a vacant position for Staff Lieutenant, Mr. Sheets' grievance matter concerned that he had not been interviewed for a subsequent vacant

Staff Lieutenant position. A Staff Lieutenant is the executive officer one step under the Shift Commander, and responsible for all activities on the shift and to work as the Shift Commander in his absence. In light of these responsibilities, the Agency looks for a good decision-maker who is knowledgeable in the facility's rules, policies and practices. The evidence showed that it was the Agency's preference to interview at least five candidates for a position. While twenty-one candidates were called for interviews for Correctional Staff Lieutenant in July 2004, only four candidates that included Mr. Sheets actually showed and interviewed on July 29. The facility requested a second certification list, which resulted in four additional candidates interviewed on August 26. Following these interviews, members of the interview panel were in agreement as to the three top candidates based upon a set format of questions and a pass/fail method utilized for the interviews. The Appellant was not within the top three candidates. A review of the top three candidates' personnel files showed they had no discipline, and the records of at least one candidate showed a better record than the Appellant's in overall seniority, attendance, and evaluation. Before this 2004 interview, the Appellant had interviewed at least three times for other Staff Lieutenant positions and acknowledged his difficulty with interviewing. In consultation with the Agency's Human Resources Office, the Agency utilized the results of the interviews for a second vacancy that then-Deputy Warden Phelps became aware of within less than a month of the August 26 interviews. The warden considers the interview panel's recommendation but makes the final decisions as to who to promote, which he did so here.

CONCLUSIONS OF LAW AND DISCUSSION

Under Merit Rule 18.5, grievances concerning promotions are permissible only where (1) it is asserted that the person who has been promoted does not meet the minimum qualifications; (2) there has been a violation of Merit Rule 2.1 or any of the procedural requirements in the Merit Rules; or (3) there has been a gross abuse of discretion in the promotion. Here, the Appellant alleged there was a gross abuse of discretion in the promotion because the Agency failed to interview him again for a subsequent vacant Staff Lieutenant position.

The term "gross abuse of discretion" has, in the Delaware Courts, been characterized on the level of bad faith or reckless indifference. *Dept. of Corrections v. Wilbur F. Justice, et al.*,

C.A. No. 06A-12-006, J. Young, op. at p. 9 (Del.Super. August 23, 2007) (unreported opinion); see also *Leung v. Schueller*, 2000 WL 264328, at 11, n. 41 (Del Ch.) (“to infer bad faith the board’s decision must be ‘so grossly off the mark as to amount to ‘reckless indifference’ or ‘gross abuse of discretion’ “). The Board concludes that the evidence presented in the record did not show a gross abuse of discretion in the Agency’s actual choice of one candidate over another. *Justice, supra* at pp. 6-8. The Appellant was interviewed on July 29, 2004 for one vacant staff lieutenant position which was awarded to a candidate whose record was better overall than the Appellant’s record. The Appellant believed he was not given the opportunity to compete for a subsequent, second vacancy. It is undisputed that the Appellant was interviewed as a prospective candidate and did not place in the top three candidates following all candidate interviews. The Board believes there was no abuse of discretion in not giving the Appellant a second interview since the interviews on July 29, in which the Appellant participated, were considered in making the second selection and the interviews for the two positions were held within thirty days of each other. It is the conclusion of this Board that no evidence was presented by the Appellant to show that the Agency acted here in bad faith or reckless indifference when it came to the actual selection decision of one candidate over another. *Justice*, at p. 8.

ORDER

It is this 6th day of December, 2007, the Decision and Order of the Board that the Appellant’s appeal for promotion to Staff Lieutenant be denied.

BY ORDER OF THE BOARD:


John F. Schmutz, Esquire, Chairperson


Joseph D. Dillon, Member


Paul R. Houck, Member²


Martha Austin, Member

² Board Member Houck dissented on the Board’s vote and decision in this matter and therefore his signature is not

APPEAL RIGHTS

29 Del. C. §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del. C. § 10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: 12/6/07

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Agency's Representative

Merit Employee Relations Board

Board Counsel

attached to this Decision and Order.